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No. 80-1955

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CARTER COUNTY FISCAL COURT, LOWELL "GENE" CLINE, CARTER COUNTY JUDGE-EXECUTIVE, AS ITS CHAIRMAN: CHARLES WILBURN, JAMES WILBURN, JOHN PENNINGTON, JASON BRADLEY, RICHARD SHORT, INDIVIDUALLY and AS MEMBERS OF THE CARTER COUNTY FISCAL COURT,

Appellants,

vs.

CARTER COUNTY PUBLIC LIBRARY DISTRICT, BOARD OF TRUSTEES, ROBERT L. CAUMMISAR, EDITH STROTHER, MYRTLE LEMASTER, JANIE QUALLS and SARAH LEWIS, AS TRUSTEES OF THE CARTER COUNTY PUBLIC LIBRARY DISTRICT and INDIVIDUALLY, AND AS REPRESENTATIVES OF A CLASS,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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The Appeal of Appellants herein ought be dismissed for the following reasons:

FAILURE OF SERVICE

Appellants have failed to comply with Rule 28.4(c) of this Honorable Court by failing to cause service of its initial pleading, motion or paper in this Court on the Attorney General of the Commonwealth of Kentucky.

Appellants clearly call in question the constitutionality of a Kentucky Statute, K.R.S. 173.710 *et seq.*, under which the majority of public library districts in Kentucky have been established, and the chief law enforcement agent of the Commonwealth has a definite interest in upholding the laws of the Commonwealth in this regard.

FAILURE TO RAISE AND PRESENT FEDERAL ISSUE IN STATE COURT

Appellants attempt to gain reversal of the Memorandum Opinion and Order Reversing entered by the Kentucky Supreme Court on February 17, 1981, as found in Appellant's Jurisdictional Statement at page 1a.

That Opinion and Order did not recite it was addressing any federal issue raised by Appellants herein. The Opinion and Order reinstated the judgment of the trial court. The Judgment of the trial court (Appellants' Jurisdictional Statement page 7a-9a) upheld establishment of the Carter County Public Library District based on two Kentucky case decisions, *Boggs* v. *Reep*, Ky., 404 SW 2d 24 (1966); *Wayne Public Library Board of Trustees* v. *Wayne Fiscal Court*, Ky., 572 SW 2d 858 (1978). In neither of these cases did the state's highest court rule on the federal constitutionality of the Kentucky statutory scheme for library creation and support by direct petition method.

Appellants' claims of raising federal constitutional issues prior to reaching this Court are incorrect. Though Appellant's Jurisdictional Statement at pages 7, 8 and 9 recites barest conclusionary statements as to violation of the federal constitution, all such references were ultimately pegged to the inapposite case of *Baker* v. *Carr*, 369 U.S. 186 (1962) and its progeny. Though Appellants actually would have more correctly pointed to *Reynolds* v. *Sims*, 377 U.S. 533 (1964), even that true "one man-one vote" decision is inapplicable to the facts of library district creation by direct petition method. In *Lockport* v. *Citizens for Community Action*, 430 U.S. 259 (1977) it was held the "one person-one vote" doctrine of *Reynolds* v. *Sims*, *supra*, is applicable only to elections where representatives are selected but not applicable in a "one shot" single issue referendum, to which library creation by direct petition is akin.

Appellants neither obtained nor filed with this Court a certificate from the Kentucky Supreme Court to the effect that a federal question was raised and decided. In the absence of such, this court is forced into doubt and conjecture as to whether a federal constitutional issue was properly raised and decided by the state court, and must make that dermination itself (see generally discussion in *Supreme Court Practice*, pg. 224-230).

In light of *Lockport*, *supra*, and the line of cases beginning with *Salyers Land Co.* v. *Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) allowing creation of districts with government powers and election of district directors without resort to one person-one vote principles, Appellees herein maintain Appellants did not raise a constitutional issue in the state courts necessarily precedent to taking this action under 28 USCA 1257(b).

To assist the court in determining whether Appellants raised a federal issue decided by state courts, Appellees direct attention of this Court to *Equitable Life Assurance Society of the United States* v. *Brown*, 187 U.S. 308 (1902) wherein it was held the mere formal allegation of having raised a federal issue in the court below is insufficient to confer jurisdiction on this Court, when herein, as in *Equitable, supra,*

> ". . . That question when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this Court as to foreclose further argument on the subject, and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit."

THE FEDERAL ISSUE IS NOT SUBSTANTIAL

Appellants do not point to a single case, state or federal, wherein it has been held a direct petition (requiring signatures of 51% of registered voters based on last previous general election) method of creation of a limited taxing district, library or otherwise, has been ruled unconstitutional under state or federal law.

The Appellants cite many cases to support their position, but none of them address the issue here involved. *Reynolds* v. *Sims*, 377 U.S. 233 (1964); *Avery* v. *Midland County*, 390 U.S. 474 (1968); *Halley* v. *Junior College District*, 397 U.S. 50 (1970); *Kramer* v. *Union School District*, 395 U.S. 621 (1969) all had to do with elected officials.

The line of cases beginning with *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973) and including *Associated Enterprises, Inc.* v. *Tultec*

Watershed Improvement District, 410 U.S. 743 (1973) and most recently *Ball* v. *James*, 101 S. Ct. 1811 (1981) carve out an exception to one person-one vote principle when it comes to creating special districts pursuant to state laws, or selecting the directors of those special districts.

As stated by the majority in *Ball* v. *James, supra:*

> ". . . The District simply does not exercise the sort of government powers that invoke the strict demands of *Reynolds*. The District cannot impose ad valorem property taxes or sales taxes. It cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health or welfare services."

Certainly a county library district system pursuant to K.R.S. 173.710 *et seq.* has none of the powers invoking the stricter standards of *Reynolds, supra.* It cannot impose any taxes, cannot control citizens, provides only the one service frequently (but even then, not always) provided by government. Its directors are not elected by the registered voters, nor by any voters under any peculiar formula, but are appointed by the elected chief executive officer of the district boundaries — the County Judge/Executive.

Appellees are struck by the cogency of the concurring opinion of Justice Powell in *Ball* v. *James, supra,* at 1821 wherein he states:

> "Our cases have recognized the necessity of permitting experimentation with political structures to meet the often novel problems confronting local communities. . . As this case il-

> lustrates, it may be difficult to decide when experimentation and political compromise have resulted in an impermissible delegation of those governmental powers that generally affect all of the people to a body with a selective electorate. But State legislatures responsive to the interests of all the people, normally are better qualified to make this judgment than federal courts. Given the broad reform effected by *Reynold* v. *Sims* we should expect that a legislature elected on the rule of one person, one vote will be vigilant to prevent undue concentration of power in the hands of undemocratic bodies."

The Kentucky State legislature which enacted K.R.S. 173.710 *et seq.* allowed no undue concentration of power in the hands of an undemocratic body. In fact the direct petition method successfully used by the library supporters of Carter County was as pure and direct participatory democracy in action as any could imagine, with the possible exception of the history laden New England Town Meetings (See *The New England Town Meeting,* New Hampshire Bar Journal, 17:210-37 Je. 1976, Lewis Soule).

Each of the 2140 registered voters of Carter County who signed the carefully drawn petitions knew he was signing on the dotted line to self impose a small ad valorem tax to support a library system. All registered voters who opposed the library system voted "no" by the simple expedient of refusing to sign the Petition when presented. Even those several thousand voters who were not approached by the library supporters after the 51% majority had been obtained voted "no".

The library supporters could easily have obtained more than the 2140 signatures obtained. Note, the Petitions

were filed on May 12, 1979, after having first signature obtained March 3, 1979. Under K.R.S. 173.720(1) library supporters had over two weeks in which to gather more signatures if necessary. As it was the Petitions contained a percentage well above the 51% of the number, based on last general election, as required.

Appellants make much of the ballot referendum held in November 1979 to show the unpopularity of the library. What Appellants fail to confide is that the library supporters made not one effort nor spent one penny to encourage an affirmative vote in the November 1979 referendum. Why? Because a library district for Carter County imposing a 4¢ per $100 ad valorem tax had already been created by the delivery in May of that year to the Fiscal Court of the certified petitions. In September, 1979 the correctness of the Petitioner's actions and establishment of the Library District was confirmed by the Carter County Circuit Court. Had the November 1979 election referendum succeeded, the end result would have been two library districts for Carter County, and two taxes which not even the most ardent library supporters thought necessary.

Even under Appellants own arguments the November 1979 referendum in which 2708 voters voted "no" as to question of a second library district creation is meaningless. inasmuch as the county has approximately 11,000 registered voters and less than a third of them voted against creation of the library district.

The New England Town Meeting model is the closest analogous method of direct citizen decision making in matters of public policy with which Appellees are acquainted. As early as 1641 in Paragraph 66 of *The Body of Liberties* adopted by The Massachusetts Bay Colony it was written, "The Freeman of every Township shall have

power to make such by laws and constitutions as may concern the welfare of their Towne (historic spelling) (The New Hampshire Town Meeting, op. cit. at 213).

As late as 1976 the efficacy of direct public participation in determining public policy was upheld in *McDonnell* v. *Town of Derry,* 350 A 2d 620 (1976).

By 1975 New Hampshire law called for a bifurcated process of Town decision making. By ballot. The citizens of Derry decided to limit salaries of city officials to less than $15,000.00. The vote so limiting was 1494 to 1369. Eleven days later at the annual deliberative town meeting, with only approximately 300 citizens in attendance, the town budget was adopted which contained salary levels in excess of $15,000. In upholding the higher salaries the New Hampshire Court relied on the doctrine that a town meeting may reconsider a matter on which it has already decided.

Similarly to New Hampshire, the Kentucky General Assembly in enacting a direct petition library creation method (K.R.S. 173.710) as well as a ballot method (K.R.S. 173.470) has appropriately allowed direct citizen participation in two different ways, each of which is whole and entire in its own right.

CONCLUSION

WHEREFORE Appellees respectfully move dismissal of the cause herein as contrary to Rules of this Court; as the case presents no substantial federal question; that any such federal question was not timely or properly raised and was not expressly passed on, and that the Kentucky decision rests on an adequate non-federal basis. This court ought to decline jurisdiction.

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